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No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
Petitioners,

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Fifth Circuit should be affirmed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Abortion is a medical procedure with a constitutional overlay. This dual status has plagued courts and legislatures for over four decades. When the government emphasizes the constitutional aspect and

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

minimizes health concerns, public health is at risk. The Court may become an "ex officio medical board" and invalidate commonsense health regulations—if legislatures even dare to enact them in the first place—or states may neglect their enforcement obligations, resulting in poor quality health care for women. Abortion is the only *medical* procedure that compels states to fight an uphill battle to enact reasonable health and safety regulations. Here, there was ample medical testimony to support the new law.[2]

Confusion has continued in spite of critical common features that, if recognized, could help resolve the tension. Even fundamental rights like free speech and voting are subject to reasonable regulation. The state may regulate the practice of medicine to ensure public safety. In both cases, there is no government obligation to finance or facilitate. The state need not pay the printing or airtime costs for a speaker. The state is not obligated to fund a medical procedure or guarantee its availability—even a life-saving procedure. The same is true of abortion. Moreover, various market and other factors are beyond the control of government. In the abortion context, these factors include indigency, demographic shifts, and variations in demand. In light of the intertwined public and private forces at work, it can be exceedingly difficult to trace causation. If abortion clinics close, is that really the result of state health regulations, or do private market forces—such

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[2] Numerous physicians submitted written testimony for the Senate Health & Human Services Committee hearing that was held on July 8, 2013. *See* http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=495 (link to the hearing).

as shifts in demand for the procedure—also factor into the analysis?

ARGUMENT

I. ABORTION IS A MEDICAL PROCEDURE THAT HAS BEEN DEEMED A CONSTITUTIONAL RIGHT. THIS UNIQUE COMBINATION CREATES TENSION IN THE GOVERNMENT'S REGULATORY ROLE.

The government's regulatory role varies considerably depending on the subject matter. Where constitutional rights are implicated, the government must exercise restraint. But when the state regulates medical procedures, it may exercise a more active role to protect its important interests in public health and safety. Where abortion is concerned, legislatures and courts walk a treacherous tightrope.

Constitutional Rights. When regulations impact constitutional rights, the government's paramount concern is not to infringe or unduly burden the exercise of those rights. The First Amendment provides that the government shall not "abridge" freedoms of speech, press, assembly, or petition, and shall not "prohibit" the free exercise of religion. The Fourteenth Amendment prohibits state action that "deprives" any person of life, liberty, or property without due process of law. Federal and state legislatures must guard against undue interference with constitutionally protected liberties.

Medical Procedures. The government has far greater latitude to regulate the practice of medicine. "In view of its interest in protecting the health of its

citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983). The state has considerable discretion in the face of medical uncertainty. *See Kansas v. Hendricks,* 521 U.S. 346, 360 n. 3 (1997). Informed written consent is a standard practice that cuts across many procedures—and may vary depending on factors such as surgical risk. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) ("we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level").

Abortion. Looking at abortion as a medical procedure, Courts have generally found it subject to comparable regulation. *Roe v. Wade*, 410 U.S. 113, 150 (1973) (state has important interest in the facilities and circumstances in which abortions are performed). *Simopoulos v. Virginia*, 462 U.S. at 510-511 (same); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 428-429 (1983) ("*Akron I*") (state has important interests in safeguarding health and maintaining medical standards). As in other contexts, "[m]edical uncertainty does not foreclose the exercise of legislative power." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007). Otherwise, a zero tolerance policy would invalidate many reasonable regulations merely because of disagreement among medical experts. That would be "too exacting a standard to impose on the legislative power. .to regulate the medical profession." *Id.* at 166. This Court has validated informed consent requirements for abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) ("no different

from a requirement that a doctor give certain specific information about any medical procedure"); *Gonzales v. Carhart*, 550 U.S. at 163-164 (same).

Constitutional rights may overlap commercial matters where the state has more discretion to regulate. Speech is not stripped of constitutional protection merely because it appears in a paid commercial advertisement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Abortion is a quintessential medical procedure that impacts health and safety—the primary concerns in this case—but it has also been elevated to constitutional status. The tension between these categories emerges in scores of cases brought before this Court over the years. Some cases lean heavily toward the constitutional side with scant consideration of health and other important interests. In *Bellotti*, for example, this Court intentionally granted minors greater protection for abortion than for First Amendment liberties, comparing abortion to its decision in *Ginsberg v. New York*, 390 U.S. 629 (1968) (rejecting First Amendment defense to conviction for sale of sexually oriented magazines to minors). *Bellotti v. Baird*, 443 U.S. 622, 636-637 (1979) ("*Bellotti II*"). Explaining the discrepancy, the Court bluntly elevated abortion above other rights: "But we are concerned here with a constitutional right to seek an abortion." *Id.* at 642.

Casey recognized the tension, noting that some of its earlier cases gave too little attention to the health interests acknowledged in *Roe*:

> *Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny*, to be sustained only if drawn in narrow

> terms to further a compelling state interest. See, *e. g., Akron I, supra*, at 427. *Not all of the cases decided under that formulation can be reconciled with the holding in Roe itself that the State has legitimate interests in the health of the woman* and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

Casey, 505 U.S. at 871 (emphasis added). This Court reaffirmed the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman" (*id.* at 846) and called it an overstatement to describe abortion as a right to decide "without interference from the State." *Id.* at 875, citing *Danforth*, 428 U.S. at 61. Instead, the right recognized by *Roe* is the "right to be free from unwarranted governmental intrusion" in making the abortion decision. *Casey*, 505 U.S. at 875 (citation and internal marks omitted). "Not all governmental intrusion is of necessity unwarranted." *Id.*

II. CONSTITUTIONAL RIGHTS AND MEDICAL PROCEDURES SHARE SOME COMMON CHARACTERISTICS.

In spite of tension in the government's regulatory role, some features are common to both constitutional rights and medical procedures. Both categories are subject to reasonable regulation. In either case, the government has no affirmative duty to finance or ensure the most convenient access. Finally, many factors beyond state control impact the availability of a medical procedure, or the means to exercise a constitutional right.

A. Constitutional Rights And Medical Procedures Are Both Subject To Reasonable Regulation.

In one of the early abortion challenges—foreshadowing *Casey*'s "undue burden" standard—Justice O'Connor observed that:

> The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context.

Akron I, 462 U.S. at 462 (O'Connor, J., dissenting), citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37-38 (1973) (strict scrutiny applicable where legislation has "deprived," "infringed," or "interfered" with a fundamental right). Even in the First Amendment context, this Court has sometimes required substantial interference. *Id.* at 462-463, citing *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe substantially"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment upon personal liberty"). Absent this high level of deprivation, judicial inquiry is limited to rational basis review.

American has historically treasured certain fundamental liberties, and the ability to access safe medical care is also important. There are nuances applicable in each category, but in both instances the state may enact reasonable regulations.

1. Even The Most Fundamental Constitutional Rights Are Subject To Reasonable Regulation.

Free speech is one of America's most cherished fundamental rights. But even in a traditional public forum, where the right to speak is at its zenith:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); (additional citations omitted).

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Casey noted the same principle. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Casey*, 505 U.S. at 873. Even where the right to vote is at stake, "the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote." *Id.* at 873-874, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

2. The Practice Of Medicine Is Subject To Reasonable Regulation.

It is "for the legislatures, not the courts, to balance the advantages and disadvantages" of laws regulating medical practices. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955). In *Lee Optical*, this Court declined to invalidate a law forbidding an optician from duplicating lenses without a prescription from an ophthalmologist or optometrist. "The mode and procedure of medical diagnostic procedures is not the business of judges." *Parham v. J. R.*, 442 U.S. 584, 607-608 (1979) (upholding Georgia's system for voluntary mental health commitment of juveniles at parental request). "There is nothing in the United States Constitution which limits the State's power to require that medical procedures be done safely. " *Akron I*, 462 U.S. at 459-460 (O'Connor, J., dissenting), quoting *Sendak v. Arnold*, 429 U.S. 968, 969 (1976) (White, J., dissenting from summary affirmance of district court ruling invalidating Indiana law requiring that first trimester abortions be conducted by a physician in a licensed health facility). Moreover, "[m]edical uncertainty does not foreclose the exercise of legislative power" with respect to any medical procedure, including abortion. *Gonzales v. Carhart*, 550 U.S. at 164.

Abortion has triggered a wave of litigation challenging health and safety regulations that would never reach the courts in any other context. But even *Roe* conceded that "[the] State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe*, 410 U.S.

at 149-150. Those interests in health and safety are "legitimate objectives, amply sufficient to permit a State to regulate abortions *as it does other surgical procedures*." *Id.* at 170-171 (Stewart, J., concurring) (emphasis added). The abortion right is "not unqualified" but rather must be weighed against "important state interests in regulation." *Id.* at 154. Similarly, *Roe*'s companion case affirmed that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

Personnel and Facilities. This case involves Texas statues that regulate the persons who perform abortions and the facilities where they are performed. State regulation of medical professionals, hospitals, and other facilities would pass without incident in any other context. A few cases have departed from the normal standard where abortion is regulated. *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) (invalidating second-trimester hospital requirement); *Akron I*, 462 U.S. at 433 (same). But that is exactly the type of legislation this Court found permissible in *Roe*—"requirements as to the qualifications of the person who is to perform the abortion" and "the facility in which the procedure is to be performed whether it must be a hospital or may be a clinic or some other place of less-than-hospital status." *Roe*, 410 U.S. at 163; *see also Doe v. Bolton*, 410 U.S. at 194-195 (state may adopt standards for licensing facilities). *See also Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (state may constitutionally prohibit person with no medical training from performing abortion). "In view of its interest in protecting the health of its citizens, the State necessarily has

considerable discretion in determining standards for the licensing of medical facilities." *Simopoulos v. Virginia*, 462 U.S. at 516 (upholding "outpatient surgical hospital" requirement for all second-trimester abortions).

Informed consent. Medical procedures are typically subject to informed consent provisions. *Casey* found these requirements valid in the abortion context, including 24-hour waiting periods, "as with any medical procedure." *Casey*, 505 U.S. at 881, citing *Danforth*, 428 U.S. at 67. This holding overruled portions of two earlier cases. *Id.* at 882. *See Akron I*, 462 U.S. at 449-450 (the inflexible waiting period allegedly had "no medical basis"). Chief Justice Burger's dissent in *Thornburgh* anticipates *Casey*:

> Today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 783 (1986) (Burger, C.J.,

dissenting). *Casey* followed the standard for commercial speech, allowing the state to require "the giving of truthful, nonmisleading information" about the procedure and attendant risks. *Casey*, 505 U.S. at 882. Moreover, as with other procedures involving another person, e.g., a kidney transplant involving a donor, the state may require information about consequences to the fetus. *Id.* at 882-883. *Casey* treated abortion as a medical procedure and not merely a constitutional liberty.

B. The Government Has No Affirmative Obligation To Finance Or Ensure The Most Convenient Means To Exercise A Constitutional Right Or Access A Medical Procedure.

No state is obligated to finance abortion or any other constitutional right. No state is required to remove all roadblocks to ensure the most convenient or inexpensive means of exercising a particular right. Judge Manion summarized it well:

> The plaintiffs argue that the state creates an undue burden under *Casey* when a regulation designed to protect the health and safety of pregnant women decreases the availability of qualified abortionists. *The implications of this argument are astounding*. Taken to its logical end, this argument would require the state to assume some *affirmative duty both to provide abortion services and to do so in a manner that is convenient* for consumers of abortion and with no regard for the quality of healthcare professionals that a state's naturally occurring

> marketplace provides. *The state bears no such obligation or duty.*

Planned Parenthood of Wis. v. Schimel, 806 F.3d 908, 932 (7th Cir. 2015) (Manion, J., dissenting).

1. The Government Is Not Obligated To Finance Or To Ensure The Most Convenient Means To Exercise A Constitutional Right.

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Rust v. Sullivan*, 500 U.S. 173, 201 (1991).

There is a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977) (upholding Connecticut regulation limiting Medicaid benefits for first trimester abortions to those "medically necessary"). The state may encourage certain actions believed to be in the public interest but crosses the constitutional line when it "attempts to impose its will by force of law." *Id.* at 476. *Meyers v. Nebraska* upheld a parent's liberty to have a child learn a particular foreign language. *Meyers v. Nebraska*, 262 U.S. 390, 400 (1923). *Pierce v. Society of Sisters* confirmed the parental right to select private schooling. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (the state may not "standardize its children by forcing them to accept instruction from public teachers only"). Neither case imposed a duty on the state to fund the specific right—to study a foreign language or to attend

private rather than public school. *Maher v. Roe*, 432 U.S. at 476-477

Abortion is subject to the same constraints as any other right:

> [T]here is no constitutional right to obtain an abortion at the clinic of one's choice and at the time of one's convenience, just as one's right to free speech does not apply in all places a protester might desire to complain.

Schimel, 806 F.3d at 932 (Manion, J., dissenting).

2. The Government Is Not Obligated To Provide Or Fund Health Care.

The state is not required to "pay *any* of the medical expenses of indigents," although it is subject to certain constitutional principles of equality if it voluntarily provides medical benefits to alleviate poverty. *Maher v. Roe*, 432 U.S. at 469-470 (emphasis added). This Court "ha[s] recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

3. The Government May Express A Preference For Childbirth Over Abortion.

The same principles hold true where the procedure is abortion. "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate

abortions." *Akron I*, 462 U.S. at 466 ((O'Connor, J., dissenting), quoting *H. L. v. Matheson*, 450 U.S. 398, 413 (1981). On the contrary, the state may encourage childbirth and act accordingly in its messages and allocation of resourcees. *Harris v. McRae*, 448 U.S. 297, 325 (1980).

Roe v. Wade "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989), quoting *Maher v. Roe*, 432 U.S. at 474. *See also Beal v. Doe*, 432 U.S. 438, 445 (1977) ("As we acknowledged in *Roe v. Wade*, 410 U.S. 113 (1973), the State has a valid and important interest in encouraging childbirth.")

The state may decline to finance abortion. *Beal v. Doe*, 432 U.S. at 447 (upholding Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions); *Maher v. Roe*, 432 U.S. at 473-474 (the state may implement its value judgment in favor of childbirth by allocating public funds accordingly); *Bowen v. Kendrick*, 487 U.S. 589, 596-597 (1988) (upholding the Adolescent Family Life Act's restriction of funding to "programs or projects which do not provide abortions or abortion counseling or referral"); *Rust v. Sullivan*, 500 U.S. at 201 (upholding regulations limiting ability of Title X recipients to engage in abortion-related activities).

Justice O'Connor pointed out in *Akron I* that *Roe* protects against "drastically limiting the availability and safety" of abortion (*Maher*, 432 U.S. at 473). *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). It prohibits state action imposing an "absolute obstacle" (*Danforth*, 428 U.S. at 70-71, n. 11), "official

interference" or "coercive restraint" (*Harris*, 448 U.S. at 328 (White, J., concurring)). *Id.* But a regulation is not invalid merely because it might inhibit abortions to some degree. *H. L. v. Matheson*, 450 U.S. at 413. Thus the City of St. Louis committed "no constitutional violation in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Poelker v. Doe*, 432 U.S. 519, 521 (1977). *Webster, Maher, Beal, McRae, Poelker, Rust*, and *Bowen* firmly establish that the government has no obligation to commit any resources to financing or facilitating abortions.

Persuasion is also constitutional. Under *Casey*'s undue burden standard, "a State is permitted to enact persuasive measures which favor childbirth over abortion, *even if those measures do not further a health interest*." *Casey*, 505 U.S. at 886 (emphasis added). This standard aligns with earlier cases such as *Beal* and *Maher*, but departs from certain intervening rulings. In the mid-1980's, this Court held that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh*, 476 U.S. at 760, quoting *Akron I*, 462 U.S., at 443-444. The Court reasoned that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Thornburgh, 476 U.S. at 762, quoting *Akron I*, 462 U.S. at 444. The dissent, foreshadowing Casey's reaffirmation of the state's right to persuade, pointed out the discrepancy:

> [O]ur decisions in *Maher*, *Beal*, and *Harris v. McRae* all indicate that the State may encourage

> women to make their choice in favor of childbirth rather than abortion, and the provision of accurate information regarding abortion and its alternatives is a reasonable and fair means of achieving that objective.

Thornburgh, 476 U.S. at 801-802 (White, J., dissenting).

C. The Availability Of Abortion Services Is Subject To Factors Beyond The Government's Control.

When outside factors restrict access to abortion, there is no "undue burden" caused by the state. As a result, state action is absent and there is no constitutional violation. The government is not in control of every factor that potentially impacts the availability of abortion. The multiplicity of factors, both within and outside the state's control, renders it exceedingly difficult to trace causation precisely—and thus to know whether the state has imposed an unconstitutional "undue burden." A woman's inability to access abortion may be due to private factors—a lack of qualified professionals willing to perform abortions, lack of privately owned clinics, her own indigence, and/or a declining rate in demand. State regulation is a factor, but it is only one among many.

Even with factors that are within government control, not all burdens are necessarily unconstitutional. "Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure." *Casey*, 505 U.S. at 874; *see also Gonzales v. Carhart*, 550 U.S.

at 157-158. Moreover, it is erroneous to suggest that the undue burden standard requires the state to guarantee access to abortion in a particular region or state. *Schimel*, 806 F.3d at 931 (Manion, J., dissenting).

1. The Availability Of Abortion Depends On The Willingness And Ability Of Private Parties.

Medical clinics, including those that perform abortions, are typically set up by private parties who raise the necessary capital and oversee operations. Privately owned clinics, like any other business, must be financially viable to survive. Private individuals must be willing and able to do the necessary footwork. Individual health care professionals must acquire certain training so they can meet state licensing requirements. Individuals must invest financially in facilities if clinics are to be established and continue operating.

This Court "has never required a state to establish a command economy in order to provide abortions. That the market may disfavor abortionists is not the state's concern, but the prerogative of the purveyors of that service." *Schimel*, 806 F.3d at 933 (Manion, J., dissenting). No state is "under no compulsory receivership that obligates it to intervene if the market fails to provide qualified abortionists within its boundaries. State inaction is not state action." *Id.* at 933. If the will of the private sector is lacking, the state is not obligated to fill the gap, and abortion services will be less available. But there is no "undue burden" under these circumstances.

2. Factors Beyond State Control Impact The Ability Of Women To Access Abortion.

A variety of factors may either render abortion more accessible or obstruct access. The state is not responsible for all of these circumstances. Indigency and all that normally accompanies it—issues with transportation, child care, and employment—exemplifies this type of factor. "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Maher v. Roe*, 432 U.S. at 474. In *Maher*, this Court upheld a Connecticut Medicaid regulation that funded childbirth but not non-therapeutic abortions. This Court continued to recognize the outer limits of the state's responsibility:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. *Indigency falls in the latter category*. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

Harris v. McRae, 448 U.S. at 316-317 (emphasis added). The Hyde Amendment at issue in *McRae* left women with the same choices as if the government had chosen not to fund health care at all. The Due Process Clause protects against "unwarranted government interference. .it does not confer an entitlement to such

funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317-318; *see* Section II(B), *supra*. Even the dissent admitted the state has no "affirmative obligation to ensure access to abortions for all who may desire them." *Id.* at 330 (Brennan, J., dissenting).

3. Factors Beyond State Control Impact Supply And Demand.

Abortion is largely controlled by private market forces. Both supply and demand vary according to factors the state cannot control, including demographic shifts and a shrinking market for abortion.

Demographic shifts in the number of women of reproductive age (under age 25) have been cited as a factor in the declining revenue of Planned Parenthood affiliates. Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, Univ. of St. Thomas Journal of Law & Public Policy, Vol. VIII, No. 1, 14 (2014), at 21 n. 50, citing V Kasturi Rangan and Elaine V Backman, *Planned Parenthood Federation of America*, Harv. Bus. Sch. Case Study No. 9-598-001 (1997; rev'd. 2002) at 4.

Demand for the procedure is shrinking.[3] Researchers at the Guttmacher Institute report a steep nationwide decline in abortion rates—38% overall—between 1990 and 2011. Abortions declined from 27.4 to 16.9 per 1,000 women aged 15-44 during this time frame, with the steepest decline occurring among teens. The 2011 rate is the lowest since *Roe* was

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[3] *See* Brief of *Amici Curiae*, CitizenLink, Charlotte Lozier Institute, and Students for Life, supporting Respondent.

decided in 1973.[4] The downward trend is also evident in Texas, where abortions decreased from 23.0 in 1991 to 13.5 in 2011[5]—*before* the laws at issue in this case were even enacted. In a market dependent on private services and facilities, declining demand logically leads to a shrinking supply.

III. IN SPITE OF CERTAIN COMMONALITIES, ABORTION'S UNIQUE STATUS HAS OFTEN PLACED LEGISLATURES AND COURTS IN A TREACHEROUS POSITION.

Unlike other medical procedures—even those necessary to save life—abortion has been deemed a constitutional right. And unlike any other constitutional right, abortion is a medical procedure subject to the same health and safety interests as any similar procedure. Courts must strike a delicate balance. If the constitutional aspect is over-emphasized and states hesitate to enact and/or enforce health regulations, public safety is jeopardized.

Constitutional rights and medical procedures share some common features, but the analogy does not hold at every point. The confusing overlap is highlighted in the recent Seventh Circuit ruling that invalidated regulations similar to those at issue here. The circuit

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[4] *See* Susan Wills, J.D., LL.M., "The Overlooked Key to the Drop in U.S. Abortions," available at https://lozierinstitute.org/wp-content/uploads/2012/09/On-Point-Wills-The-Overlooked-Key-to-the-Drop-in-U.S.-Abortions.pdf (last visited 01/27/16).

[5] http://www.guttmacher.org/datacenter/trend.jsp# (last visited 01/27/16).

court rejected the argument that women could access abortion across the state border:

> As we said in *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011), the proposition that the harm to a constitutional right [can be] measured by the extent to which it can be exercised in another jurisdiction ... [is] a profoundly mistaken assumption. It's hard to imagine anyone suggesting that Chicago may *prohibit* the exercise of a free-speech or religious-liberty right within its borders on the ground that those rights may be freely enjoyed in the suburbs.

Schimel, 806 F.3d at 918-919 (emphasis added). There are some analogies between abortion and First Amendment rights (*see* Section II), but this is not one of them. Medical procedures and free speech are not equivalent in every respect. In *Schimel*, Wisconsin did not *prohibit* abortion in any particular place—the availability in a neighboring area simply undercut the "undue burden" argument. *Schimel* also fails to consider that even free speech in a traditional public forum is subject to reasonable time-*place*-manner restrictions. In the abortion context, there is no precise counterpart to the traditional public forum in free speech jurisprudence. As discussed in Section II, availability typically hinges on private parties who are willing and able to establish clinics.

A. *Roe v. Wade* Unleashed A Prolonged Wave Of Litigation Challenging Health And Safety Regulations As Unduly Burdening Abortion Rights.

Post-*Roe* litigation highlights the unique character of abortion and its overlap between medical and constitutional concerns. In *Akron I*, this Court recognized that "abortion is a medical procedure"—thus physicians must have room to exercise medical judgment—but the Court also lumped it in with "fundamental rights" demanding that state restrictions be supported by a compelling interest. *Akron I*, 462 U.S. at 427. According to *Akron I*, the state's interest in health does not become compelling until after the first trimester. *Id.* at 429. *Thornburgh*'s reasoning is similar, drawing harsh criticism from Justice O'Connor:

> [T]he Court appears to adopt as its new test a *per se* rule under which any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right." Under this prophylactic test, it seems that the mere possibility that some women will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it.

Thornburgh, 476 U.S. at 829 (O'Connor, J., dissenting) (internal citations quotation marks omitted).

In cases of this era—e.g., *Akron I* and *Thornburgh*—this Court discarded its traditional deference to legislatures regulating medical practices, to the dismay of dissenting Justices:

> I had thought it clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and that such regulation was subject to review only for rationality

Thornburgh, 476 U.S. at 802 (White, J., dissenting). If strict scrutiny were consistently applied to medical procedures, "there is no telling how many state and federal statutes (not to mention principles of state tort law) governing the practice of medicine might be condemned." *Id.* But that is the standard Petitioners wish to apply to the health and safety regulations enacted by the State of Texas.

Chief Justice Burger, commenting on the abortion rights of minors, expressed similar concerns:

> Parents, not judges or social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation?

Id. at 784 (Burger, C.M., dissenting).

Abortion is the only *medical* procedure where states must fight an uphill battle to ensure the safety and health of women who choose it.

B. Courts Have Been Thrust Into The Role Of "Ex Officio Medical Board."

The *Thornburgh* dissents (Chief Justice Burger and Justice White), *supra*, highlight the underlying tension between abortion as a constitutional right and abortion as a medical procedure. This lethal combination has propelled this Court into the role of "ex officio medical board"—a role for which it is ill-equipped. Yet the Court stepped into this landmine as far back as *Roe* itself:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of *present medical knowledge*, is at approximately the end of the first trimester. This is so because of the *now-established medical fact* that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.

Roe v. Wade, 410 U.S. at 163 (emphasis added). A decade later, Justice O'Connor pointed out the inherent flaws:

> *The Roe framework, then, is clearly on a collision course with itself.* As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception *The Roe framework is inherently tied to the state of*

> *medical technology that exists whenever particular litigation ensues.*

Akron I, 462 U.S. at 458 (O'Connor, J., dissenting) (emphasis added). In *Akron*, the majority assumed a distinctly medical role, declaring that "present medical knowledge" justified striking down a requirement that second-trimester abortions be performed in a hospital. *Id.* at 437 The majority had no qualms about deciding that abortion was safe enough for D&E procedures to be performed in "an appropriate nonhospital setting" (*id.* at 438) and that a 24-hour "inflexible waiting period" had "no medical basis" (*id.* at 450).

Webster began to question this Court's role as "ex officio medical board" and chip away at the *Roe* framework:

> The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. As Justice White has put it, the trimester framework has left this Court to serve as the country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S., at 99 (opinion concurring in part and dissenting in part).

Webster, 492 U.S. at 518-519, cited by *Gonzales v. Carhart*, 550 U.S. at 163-164.

In the past, courts were often in the precarious position of having to balance the state's legitimate health and safety interests against the law's

impediments to abortion access. But under *Casey*'s undue burden standard, states need "not attempt to reweigh the strength of the medical justification for a law by balancing it against the law's burdens." *Id.* at 166.

C. The Burden Of Proof Should Not Be Placed On The State.

In *Schimel*, dissenting Judge Manion criticized the majority's reasoning when the case first came before the circuit court. The court mischaracterized the undue burden standard and improperly shifted the burden to the state to justify the medical necessity of the law. *Schimel*, 806 F.3d at 924 (Manion, J., dissenting). In that earlier proceeding,

> The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an "undue burden" on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight, to be "undue" in the sense of disproportionate or gratuitous.

Id. at 64-65, quoting *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014). This approach conflicts with *Casey*, *Gonzales*, and *Mazurek v. Armstrong*, 520 U.S. 968 (1997), and minimizes the magnitude of the health concerns at stake.

Casey's "undue burden" standard erects a fairly high bar for challenges to state health regulations that touch abortion. That high bar gives states breathing

space to ensure the safety and health of women seeking abortions, just as with any other medical procedure. The standard is hardly novel. Even very early cases anticipate the language in *Casey* and/or apply a comparable standard. *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) ("*Bellotti I*") ("unduly burdens"); *Maher v. Roe*, 432 U.S. at 473 (quoting *Bellotti I*); *Beal v. Doe*, 432 U.S. at 446; *Harris v. McRae*, 448 U.S. at 314; *Webster,* 492 U.S. at 529-530 (O'Connor, J., concurring in part and concurring in judgment) (expressing the view that a regulation is "not unconstitutional unless it unduly burdens the right to seek an abortion"); *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (parents may not exercise "an absolute, and possibly arbitrary, veto"—citing *Danforth*, 428 U.S. at 74); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520 (1990) *(Akron II)* (parental consent requirement with judicial bypass did not "impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion"). As Justice O'Connor explained:

> The abortion cases demonstrate that an "undue burden" has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision. In *Roe*, the Court invalidated a Texas statute that criminalized *all* abortions except those necessary to save the life of the mother.

Akron I, 462 U.S. at 464 (O'Connor, J., dissenting). Justice O'Connor's dissenting opinions in *Akron I*, *Ashcroft*, and *Thornburgh* all anticipate *Casey*'s "undue burden" standard. *See Ashcroft*, 462 U.S. at 505 (O'Connor, J., concurring in judgment in part and

dissenting in part) (concurring that pathology report and parental consent requirements are valid because neither "imposes an undue burden"; dissenting from invalidation of second-trimester hospitalization requirement, which "does not impose an undue burden"); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (heightened scrutiny should be "reserved for instances in which the State has imposed absolute obstacles or severe limitations on the abortion decision"). In *Thornburgh*, Chief Justice Burger noted that "every Member of the *Roe* Court rejected the idea of abortion on demand," so logically what *Roe* and *Doe* require is simply "that a State not create an absolute barrier to a woman's decision to have an abortion." *Id.* at 762 (Burger, C. J., dissenting), quoting *Maher v. Roe*, 432 U.S. at 481.

The initial burden logically falls on the party who challenges an abortion regulation—not the state. It would be consistent with this Court's pronouncement in *Gonzales* to require the challenger to demonstrate an "undue burden" rather than to compel the state to marshal evidence to justify its health regulations:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Gonzales, 550 U.S. at 158. This statement implicitly places the burden on the challenger. If the challenger fails to meet that burden, nothing beyond rational basis review is warranted. Petitioners would have this Court

wind the clock back to a time when the state bore the burden of proof. In *Doe*, although the Court disclaimed any intent to "express [an] opinion on the medical judgment involved in any particular case," it concluded that "[t]he State...has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient." *Doe v. Bolton*, 410 U.S. at 195. Similarly, in *Akron I*, this Court required the state to demonstrate a compelling interest and cautioned that "[t]he State's regulation may be upheld only if it is reasonably designed to further that state interest." *Akron I*, 462 U.S. at 434. The majority distinguished *Danforth*, where regulations passed constitutional muster, explaining that "[t]he decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related state concerns." *Id.* at 430.

This Court later reexamined and modified the strict scrutiny standard applied in these earlier cases, reasoning that more attention should have been paid to the portions of *Roe* that underscored state interests such as the health of the woman. *Casey*, 505 U.S. at 871. *Casey* criticized earlier cases for requiring "any regulation touching upon the abortion decision" to satisfy strict scrutiny. *Id.* It is only where the state imposes an "undue burden" on the right to make the ultimate decision that "the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. Applying *Casey*, *Mazurek* implicitly placed the burden on those challenging the Montana law that restricted the performance of abortions to licensed physicians. *Mazurek*, 520 U.S. at

972 ("it is uncontested that there was insufficient evidence of a 'substantial obstacle' to abortion").

CONCLUSION

The Fifth Circuit decision should be affirmed.

Respectfully submitted,

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